78-149

9th Cir. Ct.
No. 77-2089

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 76-473

KENNETH WAYNE WALLS,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Central District of Arizona, and from the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES CITED

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PETITION FOR WRIT OF CERTIOARI

TO THE HONORABLE CHIEF JUSTICE WARREN BURGER, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Kenneth Wayne Walls, respectfully petitions this

Honorable Court for a Writ of Certioari directed to the Court of Appeals for the Ninth Circuit, and to the District Court at Phoenix, Arizona, to review and reverse the Judgment of Conviction of the Petitioner for alleged violation of the Mail Fraud Statute, 18 U.S.C., §1341 and 2, and a violation of 18 U.S.C. § 2314 and 2, charging transportation illegally from Alaska of $10,000 in interstate commerce on or about December 20, 1971.

Appellant was sentenced to five years in prison and a $5,000 fine, and with a further order that defendant stay committed until said fine be paid. (C.T. 156).

The Court of Appeals affirmed conviction of both counts and ordered the mandate to issue forthwith and revoked an enlargement on bail, and further ordered that no petition for rehearing will be entertained.

The Judgment of the Court of Appeals was entered in the Court of Appeals on June 28, 1978, and in the District Court on June 30, 1978.

Pursuant to the Order of the Court of Appeals, no petition for rehearing was filed.

JURISDICTION

The Court of Appeals has jurisdiction to determine jurisdiction and the facts of the case, pursuant to Title 28, Section 1254(1), U.S.C. The Judgment of the Court of Appeals was entered on June 28, 1978; and in the

District Court on June 30, 1978. This Petition of Certiorari is filed within 30 days thereof, the time allowed by law.

STATUTORY PROVISIONS

The questions presented for review are:

(1) Whether either the District Court or Circuit had jurisdiction to entertain, try, or determine the appeal under the facts of this case on a charge of mail fraud or transportation of $10,000 in interstate commerce.

(2) Whether the facts in this case are insufficient to sustain a charge of mail fraud or illegal transportation of $10,000 in interstate commerce, whether the evidence is contrary to the laws and the facts.

(3) Whether the Judge of the District Court had a right to have an individual juror brought into his chambers, in the absence of the defendant, and carry on a discussion with the individual juror about the case, whether the error was harmless beyond a reasonable doubt.

(4) Whether the Court of Appeals has mistaken some of the facts in the case and therefore reached an erroneous decision in regard to the facts and the law.

(5) Whether the parole evidence applies equally in criminal cases to civil cases, and whether the Court erred in ruling otherwise.

(6) Whether the Court erred in holding that the indictme t was signed only by an Assistant United States Attorney and not by the United States Attorney violated Fed. R. Crim. P. 7.

(7) Whether the District Court erred in admitting evidence of other loan transactions by the Appellant which were not similar to the one made by the Appellant.

(8) Whether the Appellant received effective assistance of counsel.

OPINION

The Opinion of the Court of Appeals at the writing has not been published, but is attached to this Petition as Appendix "A".

CONSTITUTIONAL PROVISIONS, STATUTES, RULES OF CRIMINAL PROCEDURE

Due Process Clause of the Fifth Amendment to the Constitution of the United States; (1) Frauds and Swindles, Title 18, § 1341 (mail fraud); (2) Principals; (3) Transportation of money in interstate commerce (complete text is in the Opinion of the Court attached as Appendix "A"; and (4) Rule 43 of Rules of Criminal Procedure for the District Court.

THE FACTS

Appellant first met Mrs. Violet Bjerke in December of 1970, when she was looking for an automobile to purchase.

She bought an old automobile from him (R.T. 44). She had moved to Arizona from Alaska and was looking all over Scottsdale, Arizona, for a property to buy and invest in. She met the Appellant while looking for such a property, and ultimately she made a loan to him on December 20, 1971, of $20,000 in consideration of getting a return of $25,000 on or before January 2, 1972.

The Appellant discussed and told her that he had a deal to develop a gravel pit located in Calaveras County, California (R.T. 45-46). She asserted that he flashed a gold nugget and said it was something that they got out of it. She was not sure what he was referring to.

She and the Appellant at that time drew up a promissory note at Phoenix, Arizona, for $25,000, reading as follows:

"PROMISSORY NOTE

$25,000.00 Phoenix, Arizona

UPON DEMAND, FOR VALUE RECEIVED, I, Kenneth Wayne Walls, promise to pay to Violet E. Bjerke, or order, the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) at Phoenix, Arizona, no later than January 2, 1972.

The security for this note will be the conveyance of the mineral rights to property located in Calaveras County, Calif nia, and legally described as follows:

(Description set forth)

said conveyance being made to Violet E. Bjerke. At the date of maturity of this note the above property will be reconveyed to Kenneth Wayne Walls, provided that this note has been paid in full.

DATED this 20th day of December, 1971.

/s/ Kenneth Wayne Walls
Kenneth Wayne Walls"

This note became Exhibit "1". Mrs. Bjerke received another document which she did not know what to call it, which became Exhibit "2", which she recognized as a quitclaim deed which was signed on December 20, 1971.

She identified the two checks for $10,000 each, in which she said she filled in the name of the Appellant, one of which was on the Arizona State Bank, and the other which was on the Alaska State Bank. The Alaska State Bank check was admitted as Exhibit "3" and the one on the Arizona State Bank was Exhibit "4".

The checks were given to Walls on December 20, 1971. There was no discussion at the time of the transaction that the mails were to be used in any way by the Appellant. The $10,000 check on the Arizona State Bank was cashed at that bank.

The testimony of Ruth Cooke, who is custodian of the records of the Arizona State Bank, was to the effect that the $10,000 check on the Arizona State Bank was cashed at the Arizona State Bank, but that the $10,000 check (Exhibit "4") on the Alaska State Bank was deposited, not cashed, but "was deposited to our account." (R.T. 195). There is no evidence that the Appellant caused it to be transported or that any money that he received was other than the bank money in Arizona.

On January 2, 1972, Mrs. Bjerke began trying to collect her $25,000 for the 13-day loan which she said she made to Walls. She kept dunning him for the money everyday until he left in February. She said she went out to his house in Tempe, Arizona,

almost every day, on Don Carlos Street. When she saw Mr. Walls, she said, "I need this money bad." She said that he always had some excuse like "I'll have it tomorrow or I'll get hold of Mr. Lacoure, or somebody else, and I'll get that money for you." (R.T. 60).She said she never got it. Sometime in January, 1972, she saw a lawyer named Oglesby, and she had the quitclaim deed taken to Calaveras County, California, to have it registered (R.T. 52-53), and it came back in the mail. The document became Exhibit "2" in evidence. (R.T. 55).

Asked about the conversation which she had with Mr. Walls about the land that was contained in the quitclaim deed, defense counsel objected that the parole evidence rule would be violated if she would testify as to matters not within the document (R.T. 54). The Court overruled the objection and said that the conversation at the time goes along to either prove or disprove fraud, and that the Judge further said, "I dont know that the parole evidence rule has anything to do with it."

Mrs. Bjerke apparently had complained to the Police at Scottsdale, Arizona, (R.T. 12). She had gone to see a detective in the Scottsdale Police Department named Kelly.

The Scottsdale Police Department made a report closing the case on March 13, 1972, stating that the case was unfounded and that the victim has an attorney and this will be a civil matter. (R.T. 332).

In September of 1976, Mrs. Bjerke and her attorney contacted the F.B.I. She asserted that she had never received a penny in repayment of the loan.

A defense witness, Ted Purinton, who lives in Angels Camp, California, Calaveras County, said that he had known the Appellant for 12 years and had occasion to loan Walls money; and that in the early part of 1972, he had met a woman named Violet Bjerke and he had brought $20,000 to Phoenix in cash which he gave to the Appellant to give to Mrs. Bjerke, and he said he gave $20,000 to the Appellant in Scottsdale, in the early part of 1972. (R.T. 167-168).

He stated that he looked at the rock quarry that Ken Walls was buying in California, and he got together the money that Walls sought to borrow, which was $20,000. He stated that he witnessed Walls counting out money to the lady. He said he did not see everything, and he witnessed the woman writing something like a receipt. (R.T. 169). Mrs. Bjerke denied that she had received any money at any time. (R.T. 257, et sea.)

When the jury went out to deliberate, Juror No. 7, Mr. D. K. Bruhn, sent a note to Judge Copple requesting a conference with the Judge, a Court Reporter, a Government Attorney, and defense attorney (but not the defendant.) (R.T. 313). This was on the first day the jury was out. The Judge did not see Mr. Bruhn that day, but on the next morning at 9:00, the Judge had Mr. Bruhn brought into chambers by the bailiff. At the time, the Appellant was in the Courthouse waiting for the jury's deliberation. He was not notified of the note or the conference until after it was over. (R.T. 315). Mr. Bruhn had a discussion with the Judge in which he said he tought the jurors "have all been taken." (R.T. 317).

The judge indulged in a conversation and discussion regarding the case and the juror's feelings and views, and said that the judge will only call a mistrial if the jury cannot agree, and the judge said, "unless the government dismisses the case, we will try it again with a different jury." (R.T. 317). The juror was sent back to the Jury Room and the jury reconvened at 9:30 A.M. on March 31, 1977, and resumed deliberations until 10:48 A.M., when the judge received a note from the jury in which they asked to have the instructions of the law again read to them on both counts.

The defense requested that all the instructions be read, then the bailiff announced that the jury had reached a verdict at 10:53 A.M. The jurors then were brought in the court and announced they had reached a verdict of guilty on both counts. When the jury had concluded, the defense counsel asked leave of Court to question Mr. Sorensen, the foreman of the jury, as to what Mr. Bruhn had said about the meeting with the judge to the panel, and the judge refused permission. (R.T. 321). This has been assigned as error also. During the course of the trial, over the objections of defense counsel, the Court allowed reintroduction of evidence of other loans taken by the Appellant. The Court overruled the objections.

Under California and Arizona law, the transaction of Mrs. Bjerke was a security instrument subject to being foreclosed and sued upon, but neither Mrs. Bjerke nor her attorney took this step prior to the trial of this case.

Appellant disagrees with the statement in the Court's Opinion regarding the facts that Federal jurisdiction was obtained when the quitclaim deed was filed in California and returned to Arizona by the use of the mails.

The quitclaim deed was not filed in California by or under Appellant's direction, but was taken to Calaveras County by Mr. Oglesby, the attorney for Mrs. Bjerke, on or about January 24, 1972, and long after the loan transaction was fully completed on December 20, 1971, there was nothing in the recording of the quitclaim deed by Mrs. Bjerke's attorney that he any part or parcel of any scheme to defraud her, and there was no use of the mails in the transaction at the Arizona State Bank. Furthermore, this construction of the application of the Mail Fraud Statute by the Court of Appeals, is directly contrary to United States v. Maze, 414 U.S. 395; and Kann v. United States, 323 U.S. 88.

Likewise, the statement in the Opinion that jurisdiction was obtained when Appellant cashed Mrs. Bjerke's Alaska State Bank check in Arizona does not give jurisdiction to Count II of the indictment since the testimony of Mrs. Cooke of the Arizona State Bank shows that this check was deposited in the Arizona State Bank, and that Appellant had nothing to do with the bank processing it in interstate commerce.

Likewise, the statement in the Opinion that Walls had no interest in the mining claim is contrary to the evidence

of his father, Harley Walls, that he had purchased the property which contained a rock crusher plant and equipment, and that he paid $40,000 for the 40-acre parcel of which Lot 4, of Block 1 is a subparcel containing the gravel pit. (R.T. 242).

Harley Walls further testified that on September 21, 1971, he gave his son a general power of attorney and a quitclaim deed to the mineral rights to the property purchased from the Mohengs. (R.T. 232-233, 235-238). The fact that it was never recorded did not invalidate the transfer.

Answering the argument of the Court of Appeals, we again assert that the Federal Court either had not acquired or had lost all jurisdiction on December 20, 1971, when the money from the check was obtained and anything that was done subsequently thereto could not be in furtherance of the scheme to defraud.

In United States v. Maze, 414 U.S. 395, 405, 38 L.Ed.2d 603, 611, the Court said:

> "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead it required that the use of the mails be 'for the purpose of executing such scheme or artifice'. . ."

In Footnote 10 of the Maze case, the Court said:

> "If the Federal Government is to engage in combat against the fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this Court."

Neither the Appellant nor the prosecutrix contemplated the use of the mails in this 13-day loan, as shown by the fact that the prosecutrix expected to make a quick buck by the return and payment of her money by January 2, 1972, both parties living at the time in the vicinity of Phoenix, Arizona, and not requiring any use of the mails or contemplating it; nor did the prosecutrix condition her loan upon receiving a recorded quitclaim deed before making the loan.

Apparently, it was the suggestion of Mrs. Bjerke's attorney to record the quitclaim deed. There was no arrangement or understanding by her or her attorney with the Appellant that the quitclaim deed should be recorded or returned by mail to her in Arizona. Surely, the act of the lawyer for the prosecutrix carrying the quitclaim deed to the County Recorder's Office at Calaveras County and asking the Recorder to mail it back cannot invest Federal jurisdiction to constructively create mail fraud. Constructive crimes are repugnant to the spirit and letter of English and American law. Ex Parte McNulty, 77 Cal. 164, 168.

See McNear v. United States, 60 F.2d 861, 863; also see Parr v. United States, 363 U.S. 370, 4 L.Ed.2d 1277; Kann v. United States, 323 U.S. 88, United States v. Maze , 414 U.S. 395, 38 L.Ed.2d 603.

As to Count II, it is admitted by the Court of Appeals that the funds transferred from Alaska State Bank were through the Federal Reserve System (R.T. 121-123) and there is no evidence that it was transferred in interstate commerce through the instrumentality of the Appellant, or that the money was received by the Appellant through interstate commerce. Nor is there any evidence that Mrs. Bjerke rely on what use Appellant intended to make of the money or that she was interested in anything but getting the $25,000 in 13 days for a loan of $20,000. She at no time sought to exhaust the remedies available to her other than to have the Appellant prosecuted. There is no evidence that she relied on any representations other than what were set forth in the promissory note. The Petitioner contends that her testimony should have been confined to the Parole Evidence Rule.

The Court below has erred in the statement of facts when it asserts as follows:

> "After making the loan, Mrs. Bjerke became concerned over her investment with the Appelland and ultimately had the quitclaim deed mailed to Calaveras County, California, for recording, but not until January 24, 1972."

It appears from the face of the instrument that it was taken into the Recorder's

office personally by Mrs. Bjerke's attorney, Mr. Ogelspy, and that he requested that it be mailed back to Mrs. Bjerke. (R.T. 72). It was the request of Mrs. Bjerke's attorney to mail back the document on January 24, 1972, that formed the basis of the claim of Federal jurisdiction in this case, but the transaction involving the two checks was completed on December 20, 1971. Under the principle of United States v. Maze, 414 U.S. 395, 38 L.Ed.2d 603, there was no use of the mails in any scheme to defraud. Congress did not intent to stretch the mail fraud statute to cover situations presented by this case. (United States v. Maze, 414 U.S. 395, 38 L.Ed.2d 603.)

The Court of Appeals was also in error in stating that when Appellant took the $25,000 in checks from Mrs. Bjerke on December 20, 1971, and issued a note to her for $25,000 payable January 2, 1972, he had no title to the land or mineral right which he purported to assign.

At trial Appellant's father testified that he purchased the property in Douglas Flat for $134,000 on September 1, 1971, from the previous owners. He testified he paid $3,000 down, the balance to be paid pursuant to an agreement of sale. (R.T. 227). Apparently this 4.2 acre parcel contained a rockcrusher plant and equipment. (R.T. 231).

The father further testified that on September 23, 1971, he gave his son, the Appellant, a general power of attorney and a quitclaim deed to the mineral rights to

the property purchased from the Mohengs. (R.T. 232, 233, 235, 238).

However, he admitted that he never recorded either the quitclaim deed or the power of attorney. (R.T. 239).

Attorney Raineri testified from his records that the land value was $44,000 for the acreage, that mineral rights were very valuable, and that the gold and gravel were part of the mineral rights. (R.T. 267, 269). He testified that on September 1, 1971, they paid a down payment of $3,000.00. On September 30, 1971, they paid another $32,000, and they issued another $14,000 in lost fees of the total purchase of $134,000 (R.T. 264).

ARGUMENT

I

THE COURT WAS WITHOUT JURISDICTION OF BOTH THE MAIL FRAUD CHARGE ALLEGED IN § 1341 & 2 OF TITLE 18, U.S.C., AND UNDER § 2314 & 2 OF TITLE 18, U.S.C., SINCE NEITHER OF THEM OCCURRED WHEN THE TRANSACTIONS WERE COMPLETED ON DECEMBER 20, 1961, THE DATE BOTH CHECKS WERE GIVEN TO THE DEFENDANT. (United States v. Maze, 414 U.S. 395, 38 L.Ed.2d 603; Kann v. United States, 323 U.S. 88; McNear v. United States, 60 F.2d 861, 863; and Parr v. United States, 363 U.S. 370, 4 L.Ed.2d 1277.

Congress did not intend the Mail Fraud statute or the statute relating to transportation in interstate commerce

of money allegedly obtained by fraud to cover completed transactions; and if they had decided to do so, their statute would have been clear on the subject.

There was only one mailing shown by the evidence which allegedly occurred on January 24, 1972, from the Calaveras County Recorder's Office, and not two mailings as stated by the Court in its Opinion. Examination of the original document appears to show that the Appellant knew or saw or did anything that the mail would be used in the transaction. The transaction was scheduled only for 13 days, from December 20, 1971, to January 2, 1972, and both parties were living in Arizona.

Both checks involved were presented to the bank the same day, on December 20, 1971. The check on the Arizona bank was cashed the same day, and the other check was deposited in the local Arizona State Bank on the same day. The Alaska State Bank check went through the Federal Reserve System (R.T. 121-123).

Appellant never had anything [illegible] with the method that the Alaska bank would reimburse the Arizona bank. As far as he was concerned, both transactions involving the money were completed on December 20, 1971, and were not in furtherance of any scheme to defraud.

We have answered paragraph A in the Issues set out in the Opinion of the Court of Appeals that on jurisdictional grounds, as set out in United States v. Maze, supra, and other cases cited, Federal jurisdiction was lacking in the trial of this case.

In answer to paragraph B, was there sufficient evidence for the trier of fact to find the Appellant guilty. We assert that the evidence was insufficient under the facts of this case to find the Appellant guilty of both counts of the indictment.

In addition to the jurisdictional defects set out above, the additional facts show that the Appellant at no time used the mails in the transaction and the acts of the attorney for the prosecutrix in leaving the quitclaim deed at the Calaveras County Recorder's Office for recording could not transfer his acts in requesting the use of the mail and to place the onus of use of the mails upon Appellant. This would become a constructive crime.

Furthermore, there was no proof of fraud or any representation which Appellant made on which she relied. Her main object was to get $25,000 in 13 days for the use of $20,000.

The failure of a person to pay an obligation when due does not make him guilty of an offense, even if he disappoints his creditor in failing to make such payments. (Durland v. United States, 161 U.S. 306, 313, 40 L.Ed. 709, 711). As stated in Durland v. United States, 161 U.S. 313, the Court said:

> "It is common knowledge that nothing is more alluring and the expectations of receiving a large return on small investments."

The return that Mrs. Bjerke expected was $384.00 per day.

II

AN INDICTMENT SIGNED ONLY BY AN ASSISTANT UNITED STATES ATTORNEY IS INSUFFICIENT TO COMPLY WITH FEDERAL RULES OF CRIMINAL PROCEDURE, 7.

III

THE INDICTMENT IN THIS CASE WAS VOID, NOT BEING SIGNED BY THE ATTORNEY FOR THE GOVERNMENT BUT BY AN ASSISTANT UNITED STATES ATTORNEY.

The indictment in this case is not signed by the attorney for the government. Only an Assistant United States Attorney signed the indictment. Nowhere is there any foundation showing that Congress has authorized an assistant to sign an indictment of the grand jury. Rule 7, F.R.Cr.P., provides in pertinent part that:

> "The indictment shall be signed by the attorney for the government." (In re Grand Jury, January 1969, 215 F.Supp. 662, et seq.

IV

THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF OTHER LOAN TRANSACTIONS BY THE APPELLANT.

Over the objections of the Appellant, the Court received testimony of other loan transactions made by the Appellant. They

were not similar, they involved no charge of any crime and should not have been admitted before the jury in this case.

The Court erred in allowing the government to introduce testimony regarding loan transactions of Ensyne Strout Clark with Appellant (R.T. 124-129) and with Claude Haynes (R.T. 132-138). A defendant is to be tried only upon competent evidence and only for the offense charged. (Helton v. United States, 221 F.2d 338). The proof of an unlawful, fully unrelated to the crime charged is not admissable on any grounds. (Eley v. United States, 117 F.2d 526).

The transactions were not similar to the crimes charged and the Appellate Court admitted that the failure of the trial court to give a specific jury instruction on the use to be made of this testimony was not unduly prejudicial was itself a prejudicial error. The trial judge had a duty to protect the defendant from testimony on matters not charged in the indictment and to which the defendant had not previous notice.

It was error for the Court of Appeals to hold that the failure to give a limiting instruction to the jury was itself reversable error.

V

ILLEGAL MEETING WITH JUROR IN CHAMBERS

While deliberating charges brought in the United States District Court of

Phoenix, Arizona, that the defendant violated Title 18 U.S.C., Sections 1341 and 2341 and 2, charging mail fraud and illegal transfer of funds from Alaska to Arizona.

Juror No. 7, D. K. Bruhn, sent a note on the second day of deliberating, had a conference in chambers with Judge Coppel (R.T. 315). Mr. Bruhn had sent a note to the judge the day before requesting that he have a conference with the judge, the Court Reporter, the Government attorney, and the defense attorney. He did not mention the defendant. The defendant was in the Courthouse awaiting the actions and decision of the jury in not sending Mr. Bruhn away, telling him that he could only hear the matter in open court with the defendant present with counsel. Under Fed. R. Crim. P. 43, invited Mr. Bruhn to come into chambers, and also the government counsel and public defender. A discussion flowed privately in the Judge's chambers. The juror said to the Court, "Quite frankly, I think we have been had." The Judge asked him what he was talking about instead of terminating the session and directing that all matters be taken up in open court. The juror again continued to discuss privately and alone with the judge what he was talking about. (R.T. 316). The discussion lasted until from 9:00 through when court convened at 9:30, when juror Bruhn was returned to the Jury Room.

The defendant was never called to participate.

The error committed by the Judge affected the substantial rights of the

Appellant and the rules which Congress and the courts have set up that the defendant is entitled to be present at every stage of the proceeding, and particularly when the jury has questions to ask, and additional discussion or answers are to be given by the Court in the presence of the defendant and his counsel.

The Court of Appeals excuses the failure to have the defendant present on the authority of Snyder v. Massachusetts, 291 U.S. 907, 106-107. The Snyder case deals with the taking of a jury to the scene of a crime where it appears that there were no words spoken or any discussion had relating to the case at the scene where the jurors were taken.

The error in this case was of constitutional and statutory magnitude and was not harmless beyond a reasonable doubt. Rogers v. United States, 422 U.S. 35, 45 L.Ed.2d 1 ; Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 65 L.Ed. 853; Shields v. United States, 273 U.S. 583, 71 L.Ed. 787; Holt v. Commonwealth of Kentucky, 284 F.2d 395; Smith v. United States, 360 U.S. 1, 3 L.Ed.2d 1401; Walker v. United States, 322 F.2d 434.

The errors could be said to be harmful in this case, for the juror, after returning to the Jury Room following the comments of the judge reached a verdict diametrically opposite to the position that he expressed he was taking while talking to the Judge, and the discussions with the judge definitely influenced him and swayed him to change his position.

After the jury announced its verdict, defense counsel asked for permission to ask the foreman what comments were made by Bruhn regarding his conference in chambers (R.T. 32). This was denied. This was also error. See Little v. United States, 73 F.2d 861-866.

VI

APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL

In addition to the matters discussed by the Court of Appeals in its Opinion, the Appellant failed to do the following essential to his having a fair trial and being protected at every stage of the proceeding:

A. He failed to object to the lack of having the defendant present at the conference the judge called with Juror Bruhn, and failed to object and moved for a mistrial because of the conference with the individual juror and the events that occurred there.

B. He failed to object to the jurisdiction of the Court at the beginning of the trial under the authority of United States v. Maze, 414 U.S. 395, 38 L.Ed.2d 603; Kann v. United States, 323 U.S. 88; McNear v. United States, 60 F.2d 861, 863; and Parr v. United States, 363 U.S. 370, 4 L.Ed.2d 1277, and also at the time of motions for judgments of acquittal, he failed to offer any defense instructions limiting the jurors' consideration of other loan transactions, he failed to offer any instructions regarding the failure of the use of the mails. He also failed to offer instructions regarding the lack of

use of interstate commerce, in addition to the other matters discussed by the Court of Appeals, particularly the absence of the original note could be evidence that Mrs. Bjerke had sold it or hypothecated it, and it should have been called to the attention of the Court and jury.

REASONS FOR GRANTING THE WRIT

This case raises important questions of criminal law, particularly in the interpretation of criminal law, and specifically relating to mail fraud and to interstate commerce of money allegedly obtained by fraud and the methods, or lack of methods to prove the same.

Congress' intent to limit the use of the Federal Courts in mail fraud cases and also to fraud in interstate commerce, to schemes in being, and not those already completed, as shown in the case of United States v. Maze, 414 U.S. 395, 38 L.Ed.2d 603.

The importance of cases involving the presence of defendant and his right to be there at all times is set forth and certioari was granted in United States v. Rogers, 422 U.S. 35, 45 L.Ed.2d 1.

The importance of questions as a basis for a grant of certioari by the Supreme Court of the United States are shown by the following cases: Scherk v. Alberto, Culver Co., 417 U.S. 506, 41 L.Ed.2d 270; Gilmore v. City of Montgomery, 417 U.S. 556, 41 L.Ed.2d 304; Procunier, Director of California Department of Corrections v. Booker T. Hillery, 417 U.S. 817, 41 L.Ed.2d 498.

In each of the foregoing cases, the Court granted certioari to determine the important questions of law.

The Opinion of the Court of Appeals contains law in conflict with the decisions of this Honorable Court, to-wit: United States v. Maze, 414 US 395; Parr v. United States, 363 US 370; Kann v. United States, 323 US 88 (relating to mail fraud); Rogers v. United States, 422 US 35 (individual conference with juror); Fillippon v. Albion Vein Slate Co., 250 US 76.

WHEREFORE, Petitioner-Appellant prays that this Honorable Court grant certioari and reverse the judgments and orders below.

Respectfully submitted,

MORRIS LAVINE

Morris Lavine

Attorney for Petioner-Appellant

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 77-2089
v.	OPINION
KENNETH WAYNE WALLS, Defendant-Appellant)	

Appeal from the United States District Court for the District of Arizona

Before: BARNES and CHOY, Circuit Judges, and LYDICK,* District Judge

BARNES, Senior Circuit Judge:

The appellant, Kenneth W. Walls, was convicted by a jury in the District Court of Arizona on two counts. The first count charged the appellant with devising a scheme or artifice to defraud Violet Bjerke, by causing a quitclaim deed executed by him to be sent through the United States Postal Service on or about January 24, 1972, from Calaveras County, California, to Arizona, in violation of 18 U.S.C. §§ 1341 1/ and 2. 2/ The second count charged appellant with transporting from Alaska and Arizona $10,000 in interstate commerce on or about December 20, 1971, in violation of

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*Honorable Lawrence T. Lydick, United States District Judge, Central District of California, sitting by designation.

18 U.S.C. §§ 2314[3] and 2. Appellant was sentenced to five years in prison and a $5,000 fine with the further order that "defendant stay committed until said fine be paid." (CT 156).

We have jurisdiction. 28 U.S.C. §§ 1291 and 1294(1). The district court had original jurisdiction. 18 U.S.C. § 3231.

Appellant raises twenty-one issues on appeal. We reduce them to the six suggested by the government and conclude that none of appellant's contentions warrant reversal.

I. FACTS

We adopt a modified and enlarged form of the government's statement of facts, which is more precise and accurate than that offered by appellant.[4]

Appellant allegedly made false representations to obtain $20,000 from Mrs. Violet Bjerke. The misrepresentations concerned his claimed ownership and the mineral productivity of property in California which induced Mrs. Bjerke to loan appellant $20,000 on a short-term basis. The loan was never repaid. Federal jurisdiction was obtained when the quitclaim deed was filed in California and returned to Arizona by use of the mails, and when appellant cashed Mrs. Bjerke's Alaska State Bank check in Arizona.

In December of 1971, appellant approached Violet Bjerke in Scottsdale,

Arizona, about investing in a gravel pit and gold mining operation appellent claimed to have underway in Calaveras County, California. (RT 45-46). Appellant had tried unsuccessfully to interest Mrs. Bjerke in his investments on several prior occasions. (RT 45).

Appellant claimed to be getting gold out of the gravel pit and showed Mrs. Bjerke nuggetts he claimed were taken from the operation. (RT 57). Mrs. Bjerke agreed to invest $20,000 in appellant's venture. In return, appellant executed on December 20, 1971 a promissory note, promising to pay her $25,000 "no later than January 2, 1972." As purported security, appellant gave Mrs. Bjerke a quitclaim deed to the mineral rights in the gravel pit/gold mine. (RT 49-52).

Relying on appellant's statements, the promissory note and the security therefor, Mrs. Bjerke gave appellant two checks on December 20, 1971, one drawn on her Alaska bank account in the amount of $10,000 (RT 58; Gov. Exh. 3), and another $10,000 check drawn on an Arizona bank. (RT 59; Gov. Exh. 4).

The local check was cashed the same day; the Alaska check was endorsed and presented to the local bank the same day (apparently to be applied on Loan No. 42-11135), and was paid by the Alaska bank on December 27, 1971. By cashing the $10,000 check drawn on the Alaska State Bank, appellant caused the Alaska State Bank to withdraw $10,000 from Mrs. Bjerke's account. The Arizona Bank in Phoenix received the $10,000 from the Alaska State Bank through the Federal Reserve System. (RT 121-123).

Appellant represented to Mrs. Bjerke that he would use the money to develop the gold mine in Calaveras County. Mrs. Bjerke never received any money in return. Appellant left the Phoenix area in February, 1972. (RT 60).

After making the loan, Mrs. Bjerke became concerned over her investment with the appellant and ultimately had the quitclaim deed mailed to Calaveras County, California, for recording, but not until January 24, 1972. She received the deed back from the county recorder's office in the mail. (RT 52-53). Recorded instruments are mailed out by the county recorder in the ordinary course of business (RT 80-81).

The parcel in question is between three and five acres and is part of a larger forty-acre parcel which apparently had a fair market value ranging from $18,760 (as of May, 1970) to $30,030 (as of November, 1973). (RT 104, 105). The Calaveras County Assessor has no information that the parcel in question has ever produced commercial quantities of gold. (RT 106).

No record or appellant's ownership of Lot 4, Block 1, Douglas Flat Townsite (the mineral rights of which appellant gave Mrs. Bjerke as security) exists in the official records of Calaveras County. (RT 90). At the time of appellant's representations to Mrs. Bjerke (December, 1971), record title was in the name of one Moheng. (RT 91). Title to the parcel after January 2, 1972 was in the name of Harley R. Walls and Margaret Petts Walls

(appellant's parents), pursuant to a grant deed dated December 13, 1971 but not recorded until January 7, 1972. (RT 90). When the appellant gave Mrs. Bjerke the quitclaim deed, he had nothing to give. (RT 91, 95).

In sum, when appellant Kenneth W. Walls took the $20,000 in checks from Mrs. Bjerke on December 20, 1971, and issued his note to her for $25,000 payable in January 2, 1972, he had no title to the land, or the mineral rights which he purported to assign. Furthermore, we note that, on December 20, 1971, only Item 1 of the various deeds (see note 3, supra) was recorded in Calaveras County, where the property was located.

At trial, the defense called Ted Purinton, who testified that he loaned appellant $20,000 in January, 1972, and was present, within sight, when appellant paid Mrs. Bjerke an unknown amount of money by counting the cash out to her on the hood of his car at 5:00 p.m. on the side of a road in Scottsdale, Arizona. (RT 168-169). This scenario was flatly denied by Mrs. Bjerke (RT 258). Purinton stated that appellant had told him he needed the $20,000 to buy a rock plant. (RT 171).

Appellant's father, Harley Walls, testified for the defense that he purchased the property in Douglas Flat for $134,000 on September 1, 1971 from the previous owners. (RT 226). Walls further testified that he paid $3,000 down, the balance to be paid pursuant to an agreement of sale. (RT 227). Apparently, this 4.2 acre parcel contained a rock crusher plant and equipment. (RT 231).

For some reason, however, Harley Walls did not obtain the deed to this property until a subsequent transaction occurred between Walls and the previous owners in December, 1971 (RT 243). Walls testified that, at this latter transaction, he paid $40,000 for the forty-acre parcel of which Lot 4, Block 1, is a subparcel. (RT 242). In his testimony, Harley Walls claimed to have worked the gravel pit on the forty-acre parcel prior to having it deeded to him on December 13, 1971. (RT 244). He also stated that the entire venture was abandoned in the latter part of 1972. (RT 244-245).

Harley Walls further testified that on September 23, 1971, he gave his son (the appellant) a general power of attorney and a quitclaim deed to the mineral rights to the property purchased from the Mohengs. (RT 232-233, 235, 238). However, no such quitclaim deed was produced (RT 237), and Harley Walls admitted that he never recorded either the quitclaim deed or the power of attorney. (RT 239). The power of attorney in evidence was neither witnessed nor acknowledged (Def. Exh. A), and of course, never recorded.

II. ISSUES [5]

A. Was use of the mails and cashing of the Alaska check sufficient to bring appellant's transactions within either or both of the statutes charged in the indictment?

B. Was there sufficient evidence for the trier of fact to find appellant guilty?

C. Is an indictment signed only by an Assistant United States Attorney sufficient under Fed. R. Crim. P. 7?

D. Did the district court err in admitting evidence of other similar loan transactions by the appellant and failing to instruct the jury on the limited use to be made of such evidence?

E. Was it error for the district court to meet with a juror in chambers, in the presence of both counsel and with their consent, but in the absence of appellant? If so, was the error harmless?

F. Did the appellant receive effective assistance of counsel?

A. USE OF THE MAILS

At the outset, appellant makes what is essentially a jurisdictional argument that use of the mails was insufficient in this case to give federal authorities jurisdiction to prosecute. As to Count I, appellant contends that neither Mrs. Bjerke's mailing the deed to California for recording nor the Calaveras County Recorder's mailing of the recorded quit claim deed to Mrs. Bjerke (these being the only mailings upon which to base federal jurisdiction in this count) was for the purpose of executing a scheme to defraud as required by 18 U.S.C. § 1341. As to Count II, appellant claims there is no evidence that appellant transported or caused to be transported $10,000 from Alaska to Arizona and that, therefore, the jurisdictional requirement of interstate commerce in 18 U.S.C. § 2314 was not met.

B. SUFFICIENCY OF THE EVIDENCE AS TO COUNT II

Viewing the evidence, as we must, in the light most favorable to the government, Glasser v. United States, 315 U.S. 60 (1942), it is clear that appellant misrepresented the validity of the quitclaim deed which Mrs. Bjerke relied on for security when agreeing to loan appellant $20,000, including the $10,000 check drawn on an Alaska bank.[6] It is unquestionable that appellant then deposited in an Arizona bank a $10,000 check drawn on an Alaska bank, thereby causing the Alaska bank to transfer funds to Arizona. Such a deposit, when taken by fraud, is within the prohibition of 18 U.S.C. § 2314 despite the fact that the mails may not have been used and the check cashing may not have been in furtherance of a scheme to defraud. United States v. Willis, 528 F.2d 381 (9th Cir. 1976); United States v. Gundersen, 518 F.2d 960 (9th Cir. 1975). Thus, the jury could reasonably have concluded that appellant both obtained $10,000 by fraud[7] and then caused that amount to be transported in interstate commerce in violation of § 2314. The evidence was therefore sufficient to convict appellant on Count II. United States v. Coplen, 541 F.2d 211, 216 (9th Cir. 1976).

C. SIGNATURE ON THE INDICTMENT

Appellant attacks the indictment on grounds that it was signed by an Assistant United States Attorney and not by the "attorney for the government" as required by Fed. R. Crim. P. 7(c)(1). We hold, however, that the signature of the

United States Attorney himself was not essential and that the signature of an Assistant United States Attorney was sufficient to indicate the necessary agreement of the United States Attorney with the action taken by the grand jury. United States v. Wright, 365 F.2d 135, 137 (7th Cir. 1966), cert. denied, 386 U.S. 918 (1967); Abramson v. United States, 326 F.2d 565, 567 (5th Cir.), cert. denied, 377 U.S. 957 (1964).

D. EVIDENCE OF SIMILAR LOAN TRANSACTIONS

Evidence of other loan transactions in which appellant had defaulted was submitted by the government to rebut appellant's claim that he borrowed from Mrs. Bjerke in good faith.[8] Under Fed. R. Evid. 404(b), evidence of other acts is admissible to show the knowledge and intent, and therefore, the lack of good faith, with which appellant acted. United States v. Moore, 522 F.2d 1068, 1079 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976). Whether the danger of prejudice from admission of such evidence outweighs its probative value is committed to the trial court's sound discretion. United States v. Nichols, 534 F.2d 202, 204 (9th Cir. 1976). Under the circumstances, we cannot say that the trial judge abused his discretion in admitting the other transactions which, in our opinion, were sufficiently similar to the charged offense to be probative of a common plan, scheme, design, system, or course of conduct. See Parker v. United States, 400 F.2d 248, 251-252 (9th Cir.), cert.denied, 393 U.S. 1097 (1968) (criteria for reviewing admission of similar transactions).

Furthermore, the failure of the trial court, on its own motion, to give a specific jury instruction on the use to be made of these similar transactions, when properly viewed in the light of the case as a whole (United States v. Park, 421 U.S. 658, 674-676 (1975)), was not unduly prejudicial. Although it would have been preferable to give an instruction which carefully limited the jury's use of the similar transactions, [9] (see, e.g., United States v. Brown, 562 F.2d 1144, 1148 (9th Cir. 1977); United States v. Moore, supra, 522 F.2d at 1079), we cannot say that failure to give such an instruction sua sponte was an abuse of discretion particularly where, as here, there was no request by defense counsel for the specific instruction. See United States v. Park, supra, 421 U.S. at 676 (failure to request particular instruction considered as factor). See also United States v. McSweaney, 507 F.2d 298, 301 (9th Cir. 1974) (failure to give accomplice instruction sua sponte not reversible error). The jury instructions, taken together, focused the jury's attention on its duty to consider only the crimes charged in the indictment solely in the light of evidence tending to prove the necessary elements of those crimes. See United States v. Sambrano, 505 F.2d 284, 287 (9th Cir. 1974) (instructions, though not in precise language requested by counsel, sufficiently focused jury's attention on issue of identity); United States v. Fritts, 505 F.2d 168, 169 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975) (failure to give cautionary accomplice instruction not reversible error); United States v. Campbell, 507 F.2d 955, 958 (9th Cir. 1974) (failure to give desired instruction was not plain error in light of fair .

and neutral statements made by trial judge and otherwise detailed and accurate instructions).

While the failure to give a limiting instruction is an important factor, it is not determinative. United States v. Brown, supra, 562 F.2d at 1148. Here the failure to give such an instruction was not reversible error. See United States v. James, _____ F.2d ____ (9th Cir. May 12, 1978), slip op'n at 1537; United States v. Brown, supra.

E. MEETING WITH JUROR IN CHAMBERS

Appellant contends that his right to be present at all stages of the criminal proceeding was infringed when the trial judge held a conference, in chambers and on the record, with a juror and both counsel. (RT 315-318). At this conference, Juror D. K. Bruhn, who requested the meeting, complained that "we [presumably the jury] have been had" because "the [use of] the mails in this case are a strictly secondary point. He [the appellant] had no control over it." (RT 316). In response, the trial judge maintained strict neutrality.[10] Juror Bruhn then suggested the possibility of declaring a mistrial to which the trial judge responded with similar neutrality.[11] The judge then asked counsel if they wished to add anything else to the record of this conference. No objections were raised. (RT 318).

The general rule is that both the defendant and his counsel have the right to be present at all stages of the trial,

from arraignment to verdict and discharge of the jury. Fed. R. Crim. P. 43; Rogers v. United States, 422 U.S. 35, 38-39 (1975); Polizzi v. United States, 550 F.2d 1133, 1137 (9th Cir. 1976). However,

> the existence of a right to be present depends upon a conclusion that absence could, under some set of circumstances, be harmful. Due process does not assure "the privilege of presence when presence would be useless, or the benefit but a shadow."
>
> Snyder v. Massachusetts, 1934, 291 U.S. 97, 106-107, 54 S.Ct. 330, 332, 78 L.Ed. 674 (Cardozo, J.).

Polizzi v. United States, supra, 550 F.2d at 1138. Thus, a failure to comply with the presence rule does not call for automatic reversal.

> [E]ven improper exclusion of a defendant from a "critical" portion of the trial does not automatically require reversal, if in the particular case the defendant's absence was harmless beyond a reasonable doubt. [Citations omitted.]

Polizzi v. United States, supra, 550 F.2d at 1138.

In the instant case, the trial judge gave Juror Bruhn no information which could have influenced the guilty verdict ultimately returned by the jury. Indeed, the trial judge went so far as to assure Bruhn that

if he believed in appellant's innocence, he could continue to vote his conscience because a mistrial due to a hung jury was not an uncommon occurrence. (RT 318). The conference was held in the presence of appellant's counsel and was placed on the record. No objections to the propriety of the conference was raised although appellant's counsel was given an explicit opportunity to do so. (RT 318). Under these circumstances, the absence of appellant from the in-chambers conference was not critical and, even if erroneous, was harmless beyond a reasonable doubt.

Appellant also charges that it was an error for the trial judge to refuse defense counsel permission to ask the foreman of the jury if Juror Bruhn had made any comments to the jury about his conference in chambers. (RT 321). This was not error. Nothing said at that conference was prejudicial and defense counsel waived objection to Juror Bruhn's returning to the deliberations. Furthermore, permitting inquiry into whether the in-chambers conference was discussed by the jury could well have involved the jurors in an impermissible effort to impeach their own verdict.[12/] See Fed. R. Evid. 606(b); United States v. Weiner, _____F.2d _____ (9th Cir. May 15, 1978), slip op'n at 1584.

F. EFFECTIVE ASSISTANCE OF COUNSEL

The standard for measuring effective assistance of counsel is a matter of some uncertainty in this Circuit pending the en banc decision in Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977), petition

for rehearing en banc granted July 5, 1977. At one end of the spectrum lies the traditional farce or mockery test. 551 F.2d at 1165. At the other end lies the standard adopted in Cooper of failure to render reasonably effective assistance. 551 F.2d 1166. We are convinced that, despite appellant's objections, defense counsel would be considered to have rendered effective assistance under any test which this Court may ultimately choose. For example, appellant argues that he is entitled to a judgment of acquittal because his counsel failed to object when the prosecution was permitted to introduce a photostat, rather than the original, of the quitclaim deed given to Mrs. Bjerke as security for her $20,000 loan to appellant. But, absent any genuine question as to the authenticity of the original, the photostat was properly admitted. Fed. R. Evid. 1003. Appellant also claims that defense counsel should have demonstrated to the jury that appellant had never been in Alaska and therefore could not have transported $10,000 from Alaska to Arizona. However, as previously discussed, depositing the Alaska check in an Arizona bank created sufficient interstate commerce to bring appellant's actions within the prohibition of 18 U.S.C. § 2314.

Appellant's other claims of attorney misfeasance are equally without merit. Appellant's Sixth Amendment rights were not violated.

We need not reach appellant's arguments regarding Count I. This Circuit follows the concurrent sentence doctrine

of Benton v. Maryland, 395 U.S. 784, 791 (1969), under which a federal appellate court, as a matter of discretion, may decide that it is unnecessary to consider arguments advanced by an appellant with regard to his conviction under one count of an indictment if he was validly convicted under another count and concurrent sentences were imposed. United States v. Moore, 452 F.2d 576, 577 (9th Cir. 1971). Whether this Court decides that consideration of certain arguments is unnecessary under the concurrent sentence doctrine depends upon the determination, in the exercise of the Court's discretion, that the convictions which would not be examined will not entail adverse collateral legal consequences for the appellant. Id.

Appellant was sentenced to five years on each of two counts, the sentences to run concurrently. (CT 156). A $5,000 fine was imposed only as to Count II. Appellant has not suggested, and we do not perceive any collateral legal consequences adverse to appellant, over and above those flowing from his conviction on Count II, will result if the conviction on Count II is allowed to stand without appellate review. We accordingly decline, in the exercise of our discretion, to consider appellant's arguments insofar as they are directed solely to Count I of the indictment.

CONCLUSION

The judgment as to Count II is affirmed. In the exercise of our discretion, we decline to consider appellant's arguments directly solely to the conviction under

Count I. The Clerk will issue the mandate forthwith. Enlargement on bail is revoked now if appellant is still on bail. No petition for rehearing will be entertained. See Fed. R. App. P. 2.

FOOTNOTES:

1.

§ 1341. Frauds and Swindles

Whoever, having devised or intending to devise any scheme of artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places . . . any matter or thing whatever to be sent or delivered by the Postal Service, . . . or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949, c. 139; §34 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 778.

2.

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

3.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate . . . commerce any . . . securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, . . . in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended May 24, 1949, c. 139, § 45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub. L. 90-535, 82 Stat. 885.

4.

In recounting the facts, it is important to understand (1) the dates on which certain documents introduced in evidence were allegedly prepared, delivered, and recorded; and (2) the fact that while some of the documents relate to a group of five parcels of real property, other documents refer only to one parcel (i.e., Parcel Three, Lot 4, Block 1), or to no specific parcels. We therefore list chronologically the exhibits in the record:

Item 1 (Gov. Exh. 7): Certified copy of Deed of Trust dated 10/7/68, recorded 10/23/68, executed by Wilbur W. Moheng and Martha Moheng, his wife, to Calaveras Title Co.,

Trustee, and Cecil Uglow and Helen E. Uglow, his wife, as joint tenants, covering five parcels of land to secure a $22,000 promissory note.

Item 2 (Def. Exh. A): Power of Attorney dated 9/23/71 (never witnessed, acknowledged, or recorded), granted by Harley R. Walls and Margaret Walls to Kenneth Walls (the appellant). No description or reference to any specific real property is made.

Item 3 (Gov. Exh. 6): Certified copy of Grant Deed from the Mohengs to Harley Walls, dated 12/13/71; acknowledged 12/13/71; recorded 1/7/72, 2:21 p.m., covering the same five parcels listed in Item 1, supra.

Item 4 (Gov. Exh. 9): Certified copy of Deed of Trust from Harley R. Walls and Margaret Petts Walls, his wife, to Calaveras Title Co., and the Mohengs, as beneficiaries, dated 10/26/71; acknowledged 12/13/71; recorded 1/7/72, 2:25 p.m., covering the same five parcels listed in Items 1 and 3, supra.

Item 5 (Gov. Exh. 8): Certified copy of Request for Notice of Default under Deed of Trust (Item 1, Gov. Exh. 7, supra), filed by the Mohengs, dated 10/27/71; acknowledged 10/30/71; recorded 1/7/72, 2:21 p.m., covering the same five parcels listed in Items 1, 3, and 4, supra.

Item 6 (Gov. Exh. 1): Photostat of promissory note, dated 12/20/71, secured by assignment of "mineral rights" to property legally described as "Lot #4, of Block #1" (being "Parcel Three" of the five parcels described above).

Item 7 (Gov. Exh. 3): Cancelled Alaska bank check, made by Violet E. Bjerke and endorsed by Kenneth Walls, dated 12/20/71, in the amount of $10,000, paid 12/27/71.

Item 8 (Gov. Exh. 4): Cancelled Arizona bank check, made by Violet E. Bjerke and endorsed by Kenneth Walls, dated 12/20/71, in the amount of $10,000 paid 12/20/71.

Item 9 (Gov. Exh. 2): Certified copy of original quitclaim deed, dated 12/20/71; acknowledged 12/20/71; executed by Kenneth W. Walls, the appellant, before Joseph C. Raineri, notary public; recorded 1/24/72 at the request of Mrs. Bjerke.

Item 10 (Gov. Exh. 5): Certified photostatic copy of Item 9, supra.

5.

Technically, appellant also raised a claim that he was denied his right to a speedy trial. Appellant's Brief at 4. However, this issue was not argued and we consider it to have been abandoned. Further, it has no merit.

6.

Very obviously, Mrs. Bjerke was a poor witness in her own behalf. She did not know if there were two papers signed by appellant Walls (promissory note and quitclaim deed) or whether $25,000 or $20,000 was to be paid to her on January 2, 1972. However, the exhibits on file speak to the fact that there were two documents, that Mrs. Bjerke did pay appellant $20,000 and that $25,000 was owed her by appellant, as his note states.

While the appellant's signatures on the deed and the note differ because of his use of a middle name in one, and not in the other, no question would be raised by an average person, after examining the two signatures, as to whether the same person had signed them.

7.

Appellant argues that there was no proof that he had the requisite specific intent to defraud or lack of good faith. This is a question for the trier of fact. Intent to defraud can be specifically admitted or confessed. United States v. Jones, 425 F.2d 1048, 1058 (9th Cir.), cert. denied, 400 U.S. 823 (1970). Where intent to defraud has been charged in the indictment, instructed upon and found by the jury, we cannot say that the evidence of intent was insufficient. Id. Furthermore, even if appellant did not actually know that his representation was false, he could have been found by the jury to have acted in reckless disregard of the truth or falsity of his statements, which is sufficient to charge a defendant with knowing

falsity. United States v. McDonald, _____ F.2d _____ (9th Cir. May 4, 1978) slip op'n at p. 1431.

8.

In December, 1971, appellant borrowed $20,000 from Ensyne Clark, after telling Clark that he was buying property in Alaska from a lady named Campbell. Clark was never repaid. In February, 1977, the appellant told Clark he used the $20,000 to repay a lady in Mesa, Arizona. (RT 124-129). Appellant later told Mr. Clark that he would be paid in February, 1972. Mr. Clark has never been repaid. (RT 128-29).

In the spring of 1975, appellant borrowed $9,500 from Claude Haynes on appellant's representation it was to be used to promote the sale of a ranch in California. Mr. Haynes has received back $1,400, and is owned the balance. Appellant represented to Mr. Haynes that the balance would be paid upon the closing of the purchase of the ranch. The sale negotiations for the ranch began in March, 1975. (RT 132-137).

9.

The jury was instructed to consider similar transactions in determining whether appellant acted in good faith or with intent to defraud. (RT 305-306). However, the use of similar transactions was not specifically restricted to the uses set forth in Fed. R. Evid. 404(b).

10.

THE COURT: I can't argue with you, Mr. Bruhn. All I can tell you is that you go in the jury room with the other eleven jurors and you vote your conviction. If you feel that he is not guilty of the charge, then you should hold out for not guilty. If you become convinced that he is guilty of the particular charge -- that is all he is on trial for, is what he is charged with -- then you will have to vote your conscience, vote it as you see the evidence, but I can't explain to you any further. I cant tell you what to do. I can't tell you what I think of the evidence. I can't tell you what I think of the case or anything else. That is not my job nor my prerogative. [RT 316-317].

11.

THE COURT: The only reason I would call a mistrial other than for some misconduct that may happen that would require a mistrial, would be if the jury can't agree, and if the jury can't agree, then we will declare a mistrial and, unless the government dismisses the case, we will try it again with a different jury. [RT 317].

12.

All that the foreman could have testified to was the fact that Bruhn had participated in the in-chambers conference; he would

not have been permitted to testify as to how that conference affected the jury's mental processes in arriving at a verdict. Mattox v. United States, 146 U.S. 140, 149 (1892). But the fact that the conference had occurred was obviously well known to both counsel who had been present. Thus, no lawful purpose would have been served by permitting interrogation of the foreman in the manner requested by defense counsel.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 30 1978
W.J. FURSTENAU, CLERK
UNITED STATES DIST COURT
FOR THE DISTRICT OF ARIZ

UNITED STATES OF AMERICA]
]
Plaintiff-Appellee,]
]
] No. 77-2089
vs.]
] DC #CR 76-473 WPC
KENNETH WAYNE WALLS,]
]
Defendant-Appellant.]

APPEAL from the United States District Court for the District of ARIZONA (PHOENIX)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of ARIZONA (PHOENIX) _____ and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the ____judgment of the said District Court in this Cause be, and hereby is affirmed_____.

A TRUE COPY
ATTEST JUN 28 1978
EMIL E. MELFI, JR.
Clerk of Court
by: /s/
Deputy Clerk

Filed and entered June 28, 1978.